85-386

Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAPPY, KAPLON, VOGEL, & PHILLIPS,
a professional law corporation,
and RALPH M. PHILLIPS,

Cross-Petitioners,

-vs.-

VIRGINIA ARAGON,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VANESSA D. WALTON
ROSWELL BOTTUM
A PROFESSIONAL CORPORATION
3200 Wilshire Boulevard
South Tower - 14th Floor
Los Angeles, California 90010
Telephone: (213) 487-0402

Attorneys for Cross-Petitioners,
PAPPY, KAPLON, VOGEL & PHILLIPS
AND RALPH M. PHILLIPS

132pp

No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAPPY, KAPLON, VOGEL, & PHILLIPS,
a professional law corporation,
and RALPH M. PHILLIPS,

Cross-Petitioners,

-vs.-

VIRGINIA ARAGON,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VANESSA D. WALTON
ROSWELL BOTTUM
A PROFESSIONAL CORPORATION
3200 Wilshire Boulevard
South Tower - 14th Floor
Los Angeles, California 90010
Telephone: (213) 487-0402

Attorneys for Cross-Petitioners,
PAPPY, KAPLON, VOGEL & PHILLIPS
AND RALPH M. PHILLIPS

QUESTION PRESENTED

Whether section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a), preempts a state-law tort action for alleged legal malpractice by union attorneys representing a union in an arbitration proceeding under a collective bargaining agreement.

PARTIES

The parties to the proceeding are as follows:

(1) Appellant-Cross-Respondent, VIRGINA ARAGON;

(2) Appellees, FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY ("Ralphs");

(3) Appellees, CHAUFFEURS, SALES DRIVERS, WAREHOUSEMAN AND HELPERS LOCAL NO.

572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN AND HELPERS OF AMERICA ("LOCAL UNION");

(4) Appellees-Cross-Petitioners, PAPPY, KAPLON, VOGEL & PHILLIPS and RALPH M. PHILLIPS.

TABLE OF CONTENTS

Section	Page
QUESTIONS PRESENTED	i
PARTIES	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	12
I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULING IN LUECK	14
II. THE NINTH CIRCUIT COURT'S DECISION FRUSTRATES THE UNIFORM POLICY OF NATIONAL LABOR LAW	21
III. THE DECISION BELOW, IN SHARP CONTRAST TO SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, RECOGNIZES A CAUSE OF ACTION AGAINST THE AGENT OF A UNION FOR A UNION WRONG	22
CONCLUSION	24

APPENDIX A	Opinion of the Court of Appeals	1a
APPENDIX B	Order Denying Rehearing En Banc	1b
APPENDIX C	Order Granting Motion To Dismiss	1c
APPENDIX D	Findings of Fact and Conclusions of Law;	1d
APPENDIX E	First Amended Complaint for Damages and Reinstatement	1e

TABLE OF AUTHORITIES

Cases	Page
Allis-Chalmers Corp. v. Lueck, 53 U.S. L.W. 4463 (1985)	11, 13, 15, 17, 18, 20, 21
Amalgamated Assoc. of Street, Elec., Railway, and Motorcoach Employees v. Lockridge, 403 U.S. 274, 2191, 91 S.Ct. 1909, 1920 (1970)	24
Aragon v. Federated Department Store, Inc., 750 F.2d 1447 (9th Cir. 1985)	2
Atkinson v. Sinclair Refining Co., 370 U.S. 238, 248-49, (1962)	23
Bowen v. U.S. Postal Service, 459 U.S. 212, 225 (1983)	18
Budd v. Nixen, 6 Cal.3d 195, 200, 491 P.2d 433, 98 Cal.Rptr. 849, 852 (1971)	19
Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 296-97, (1977)	24
Hines v. Anchor Motor Freight, 424 U.S. 554 (1976)	18
Lewis v. Benedict Coal Corp., 361 U.S. 459, 470, ( )	23
Lysick v. Walcomb, 258 Cal.App.2d 136, 65 Cal.Rptr. 406 (1908)	20
Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965)	16

Cases	Page
United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960)	15
Vaca v. Sipes, 386 U.S. 171, 177 (1967)	16, 17, 19, 21

Statutes	
28 U.S.C. §1254(1)	3
29 U.S.C. §159(a) (National Labor Relations Act)	21
29 U.S.C. §185(b) (Labor Management Relations Act of 1947 §301)	3, 4, 22, 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985
No. 85

PAPPY, KAPLON, VOGEL & PHILLIPS,
a professional law corporation,
and RALPH M. PHILLIPS,

Cross-Petitioners,

-vs.-

VIRGINIA ARAGON,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pappy, Kaplan, Vogel & Phillips, a professional law corporation, and Ralph M. Phillips (hereafter collectively referred to as "Attorneys"), respectfully cross-petition

for a writ of certiorari to review the judgment of the United State Court of Appeals for the Ninth Circuit entered in this case on January 11, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 750 F.2d 1447 (9th Cir. 1985). The May 16, 1985 order of the Court of Appeals denying the petition for rehearing of cross-respondent Virginia Aragon is not reported. Further, the December 7, 1983 order of the District Court granting the motion of cross-petitioners, Pappy, Kaplon, Vogel & Phillips and Ralph M. Phillips to dismiss all causes of action is not reported. The opinion, the judgment, the findings of facts and conclusions of law, and the complaint are reprinted in the Appendix.

///

///

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1985, and the order of the Court of Appeals denying Virginia Aragon's petition for rehearing was entered on May 16, 1985. (Appendix B.) An order on filing and spreading of Judgment of Court of Appeals was entered by the District Court on July 15, 1985. On August 15, 19895, counsel for cross-petitioners received the petition for Certiorari of cross-respondent-Virginia Aragon. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §185(b) provides in pertinent part:

> Any labor organization which represents employees in an industry affecting commerce ...shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity...in the

courts of the United States. Any money judgment against the labor organization in a District Court of the United States shall be enforceable only against the organization and its assets and shall not be enforceable against any individual member or his assets.

STATEMENT OF THE CASE

The federal question sought to be reviewed herein concerns the reversal by the Court of Appeals for the Ninth Circuit of the district court's order granting the motion to dismiss of cross-petitioner/ respondents herein, Pappy, Kaplon, Vogel & Phillips, a professional corporation and Ralph M. Phillips, (hereinafter, collectively referred to as "Attorneys") on the basis that the state malpractice claim against Attorneys was "inextricately intertwined with the federal claims asserted against Aragon's Local Union and her employer, under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) (hereinafter referred to as

"LMRA"), so as to be preempted by federal labor law. (Appendix "D", Findings of Fact and Conclusions of Law, 8d.) The facts of the case are discussed below.

Cross-Respondent/petitioner, Virginia Aragon ("Aragon"), began working for Ralphs Grocery Company ("Ralphs") on May 1, 1967 and was discharged on December 1, 1981. She was a member of the Chauffeurs, Salesdrivers, Warehouseman & Helpers, Local 572, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of American ("Local Union").

As aptly stated by Aragon in her petition, the Local Union and Ralphs were parties to a written collective bargaining agreement which was in full force and effect at the time of Aragon's discharge and which controlled the terms and conditions of Ralphs' employees and who were also members of the Local Union. (See Petition for Writ of Certiorari of Aragon, pages 7-8). The collective bargaining

agreement provides in pertinent part that Ralphs could not discharge an employee except for good cause and that the Union would not discriminate against any employee on account of sex, age, or for upholding the principals of unionism. (See Aragon's Petition for Certiorari, page 8.) Additionally, the collective bargaining agreement contains a grievance procedure whereby an employee's discharge could be submitted to a neutral arbitrator whose decision would be final and binding on the parties. (See Aragon's Petition for Certiorari, page 8.)

The Local Union filed a grievance on Aragon's behalf. The Union retained Attorneys to represent its interests in the arbitration proceeding.

An arbitration hearing was scheduled which resulted in a settlement of the Local Union's grievance. The settlement provided that Aragon was to be immediately reinstated with Ralphs and she withdrew all

claims against Ralphs. Subsequently, Aragon quit her job at Ralphs on April 2, 1982.

Aragon did not request that the Local Union file a grievance after she quit her job. Instead, she filed her original complaint in the California State Superior Court. Aragon's complaint alleges that:

> 52. The relationship existing between plaintiff and defendant's Law Firm and PHILLIPS was of a fiduciary and confidential nature, requiring undivided loyalty to plaintiff and complete and full disclosure of material facts pertaining to her rights arising from her employment relationship with defendant RALPHS and the controlling collective bargaining agreement.

Aragon further alleges, in her cause of action against Attorneys for legal malpractice, that in undertaking to represent her in the grievance and arbitration hearing, they breached their duty to her in the following respects:

1. In ignoring her complaints of

discrimination, harassment and abuse by defendant Riveria;

2. In failing to conduct a proper investigation as the facts underlying plaintiff's December 1, 1981 discharge;

3. In failing to subpoena witnesses and present evidence at the March 12, 1982 hearing;

4. In coercing her to accept settlement of her December 1, 1981 discharge;

5. In failing to take action to rescind or vacate the settlement agreement entered on March 12, 1982 to proceed with an arbitration hearing concerning her discharge;

6. In failing to adequately inform her of her rights and of the collective bargaining agreement and of her legal rights and remedies against the Union and Ralphs.

All parties to this action, joined in removing the case from the Superior Court

to the United States District Court for the Central District of California on August 31, 1983.

Subsequently, the District Court granted summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the basis that Aragon's actions against both the Local Union and the employer were time-barred by applicable statute of limitation. The District Court also granted the motion to dismiss in favor of Attorneys and dismissed Aragon's state malpractice action, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court held that the state law tort claims, including, Aragon's claim for legal malpractice, are "all based on the alleged breach by Federated Department Stores, Inc., and Bob Rivera of the applicable collective bargaining agreement and on the alleged breach by Local 572 of its duty of fair representation." (Appendix D, Findings of Fact and

Conclusions of Law, p.8d.) The Court further held that the "gravamen of each of these tort claims is a breach of the collective bargaining agreement and a breach of the duty of fair representation by Local Union No. 572", and therefore, "are inextricably intertwined with the federal claim under section 301 and are preempted by the exclusive application of federal law to actions alleging breach of a collective bargaining agreement".

The Ninth Circuit Court of Appeals affirmed the judgments in favor of Ralphs and the Local Union on the grounds that both actions were time-barred by the state 100-day statute of limitations and the federal six month statute of limitations, applied retroactively. The Court of Appeals however, reversed and remanded Aragon's malpractice claim against Attorneys, holding that it was not preempted by federal labor law. With respect to Aragon's malpractice claim, the

court reasoned as follows:

> It poses no significant threat to the collective bargaining process; the defendant is not even a party to the collective bargaining agreement. (Citation omitted)....The malpractice claim does not alter the economic relationship between employer and employee; it alters only the relationship between the former employee and a wholly separate entity, the union's counsel. The remedy is in tort, and it is based on the standard of care the attorney owes the client; it is not a contractual remedy under a collective bargaining agreement. It also further the state's interest in protecting the public from legal malpractice, an interest that transends labor law.

After the Ninth Circuit rendered its decision, reversing Aragon's malpractice claim to the District Court with instructions to remand to the California State Court, this court decided Allis-Chalmers Corp. v. Lueck (hereinafter referred to as "Lueck"), 53 U.S.L.W. 4463 (1985) holding that federal labor law

preempts bad-faith tort claims.

Aragon petitions this court for a writ of certiorari. Attorneys respectfully cross-petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Aragon petitions this court to review only a part of the judgment below affirming that Aragon's actions against her union for breach of the duty of fair representation, under §301 of the LMRA, was barred by the applicable statute of limitations. This cross-petition addresses another, closely-related issue not raised in Aragon's petition with respect to the lower court's decision, holding that Aragon's action against cross-petitioners for legal malpractice is not preempted by federal labor law. The decision, interpreting §301 of the LMRA is of significant importance with far-reaching implications effecting all union attorneys representing a union in an arbitration proceeding under a collective bargaining agreement, and

warrants review by this Court.

There are three reasons for granting the writ. First, the decision below directly conflicts with this court's ruling in Lueck. This Court held in Lueck that when the determination of a state-law claim depends on an analysis of a collective bargaining agreement, the claim must either be treated as one arising under section 301 of the LMRA or be dismissed as preempted by federal labor-contract law.

Second, the decision of the Court of Appeals threatens to frustrate the uniform application of the LMRA with respect to disputes arising under collective bargaining agreements.

Third, the decision below is in sharp contrast to section 301 of the LMRA which is the exclusive remedy available for union wrongs.

///

///

///

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULING IN LUECK

Lueck was employed by Allis-Chalmers Corporation. Lueck was also a member of the Local Union. Allis-Chalmers and Lueck were parties to a collective bargaining agreement which incorporates a separately negotiated group health and disability plan funded by Allis-Chalmers and administered by Aetna Life and Casualty Company. Lueck suffered an injury which was covered under the union's health and disability plan. The collective bargaining agreement provided for grievance procedures and binding arbitration. Lueck did not arbitrate his dispute concerning the manner in which his disability claim was handled by Allis-Chalmers and Aetna and instead filed an action in the State Court against Allis-Chalmers and its insurer, Aetna. The trial court granted summary judgment in favor Allis-Chalmer and Aetna on the basis of preemption under section 301. The Court

of Appeals affirmed and the Supreme Court of Washington reversed.

This court, in reversing the Supreme Court of Washington's decision, held that the proper analysis must focus on;

> "whether the...tort action [for breach of the duty of good faith as applied here] confers non-negotiable state law rights on employers or employees independent of any right established by contract or, instead, whether evaluation of the tort, claim is inextricably intertwined with considerations of the terms of the labor contract. If the state tort law purports to define the meaning of the contractual relationship, that law is preempted." Lueck, supra, at 4465.

A grievance and arbitration procedure has long been recognized by this court as an intregal part of the collective bargaining agreement. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). This court

stated:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.... The grievance procedure is, in other words a part of the continuous collective bargaining process.

Moreover, this court recognized the Union's interest in representing employees in the grievance proceedings. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). This court stated in Vaca v. Sipes, 386 U.S. 171, 191-192 (1967), as follows:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are

> assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of that agreement.

The Court of Appeals wrongly decided that Aragon's legal malpractice claim "poses no significant threat to the collective bargaining process."

It is necessarily a question of federal contract interpretation as to whether Attorneys had any obligation to Aragon regarding the prosecution of her arbitration and whether, their conduct breached any contractual provision of the collective bargaining agreement.

As this court reasoned in Lueck, the employee's rights (to receive benefit payments for nonoccupational injuries) not

only "derived from the contract but is defined by the contract obligations of good faith, and any attempt to assess liability here inevitably will involve contract interpretation". Id., at 4466. Similarly, Aragon's rights, if any, derive from the collective bargaining agreement and any attempt to assess liability against Attorneys here, must necessarily involve contract interpretation.

Indeed, The parties to a collective bargaining agreement may chose not to include a grievance procedure supervised by the Union or may choose not to make the procedure exclusive. Bowen v. U.S. Postal Service, 459 U.S. 212, 225 (1983). Moreover, no employee has an absolute right to have a grievance taken to arbitration. Hines v. Anchor Motor Frieght, 424 U.S. 554 (1976). The union has the flexibility and discretion in deciding whether or not to use attorneys in arbitration proceedings, and to do what is appropriate under the

circumstances of each case. The standard pronounced by this court in evaluating whether the Union breached its duty of fair representation, requires a showing by the employee that the Union's actions were "arbitrary, discriminatory or in bad faith" Vaca v. Sipes, 386 U.S. 171, 191 (1966).

For example, to allow the states to dictate and regulate the conduct of union attorneys, will result in conflicting and varying standards. Under state law in California, in order to recover for damages caused by the attorney's malpractice, the plaintiff has the burden of establishing: (1) the attorney-client relationship or other basis of duty; (2) the negligent act or omission; (3) proximate causation; and (4) actual loss or damage resulting from negligence. Budd v. Nixen 6 Cal.3d 195, 200, 491 P.2d 433, 98 Cal.Rptr. 849, 852 (1971). Moreover, in establishing causation, the plaintiff must prove that the attorney's negligence caused the

injury, or in other words, that it is more likely that not, that the attorney's conduct was a substantial factor in causing the unfavorable result. Lysick v. Walcomb, 258 Cal.App.2d 136, 65 Cal.Rptr. 406, 417-418 (1968).

The Union's representative should be held to no greater standard than the Union where no attorney-client relationship exists. To require such, necessarily calls for the states to interpret and define the parties contractual obligations under the collective bargaining agreement, which is expressly disfavored by this court in Lueck, supra.

This court held in Lueck, supra, that when "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties and a labor contract, that claim must be either treated as a section 301 claim, (citation omitted), or dismissed as preempted by federal labor contract law."

Id., 53 U.S.L.W. at 4467. Because the Ninth Circuit Court's decision conflicts with this ruling, this cross-petition for a writ of certiorari should be granted.

II. THE NINTH CIRCUIT COURT'S DECISION FRUSTRATES THE UNIFORM POLICY OF NATIONAL LABOR LAW.

This court in Lueck acknowledged the congressional intent of preemption in preserving the central role of arbitration. Section 9(a) of the National Labor Relations Act, 29 U.S.C. §159(a), provides that a Union is the exclusive bargaining representative of all employees under the collective bargaining agreement. Vaca v. Sipes, supra at 171. As posited in Lueck, the most harmful effect of the Ninth Circuit's decision is that it would allow Aragon's action to be brought directly in state court if dissatisfied, as here with the result of her arbitration in contravention of the collective bargaining agreement. See, 53 U.S.L.W. at 4466. The

collective bargaining agreement provides that the arbitrator's decision is final and binding on the employer and the union. This decision would allow the arbitrator's decision to be circumvented, and its effectiveness frustrated, if section 301 of the LMRA,is not construed to preempt such claims.

III. THE DECISION BELOW, IN SHARP CONTRAST TO SECTION 301 OF THE LABOR MANAGEMENT RELATION ACT, RECOGNIZES A CAUSE OF ACTION AGAINST THE AGENT OF A UNION FOR A UNION WRONG.

Section 301 of the LMRA specifically states in pertinent part that:

> Any labor organization which represents employees in an industry effecting commerce...shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity...in the courts of the United States. Any money judgment against a labor

> organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets. 29 U.S.C. section 185(b) (Emphasis Added)

When Congress passed section 301, it mandated that only the Union was to be made to respond for Union wrongs, and that union members were not subject to levy. In Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962), at 248-249, this Court ruled that under section 301 a union officer or member could not be held personally liable for union wrongs. In Atkinson, supra, court emphasized the congressional intent as follows:

> "[A] congressional intention that the union as an entity, like a corporation, should in the absence of an agreement be the sole source of recovery for injury inflicted by it." (Lewis v. Benedict Coal Corp., 361 U.S. 459, 470.) This policy cannot be

> evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable. 370 U.S. 249, 82 S.Ct. 1325.

Section 301(a) is the exclusive remedy available to Aragon and Aragon is therefore precluded from bringing any state cause of action arising out of an alleged breach of the collective barganing agreement. Farmer v. Limited Brotherhood of Carpenters, 430 U.S. 290, 296-297 (1977); Amalgamated Assoc. of Street, Elec. Railway and Motor Coach Employees v. Lockridge, 403 U.S. 274, 291 (1970).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant a writ of certiorari to review

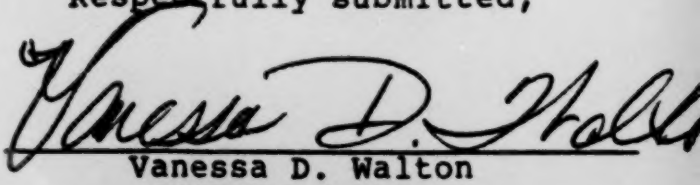
///

///

the decision of the Ninth Circuit Court of Appeals.

DATED:

Respectfully submitted,



Vanessa D. Walton
ROSWELL BOTTUM
A PROFESSIONAL CORPORATION
3200 Wilshire Boulevard
South Tower - 14th Floor
Los Angeles, California 90010
Telephone: (213) 487-0402
Attorneys for
Cross-Petitioners
PAPPY, KAPLON, VOGEL &
PHILLIPS AND
RALPH M. PHILLIPS

0021b

APPENDIX

APPENDIX "A"

OPINION OF THE COURT BELOW

Ninth Circuit

No. 83-6435

VIRGINIA ARAGON, Plaintiff,

vs.

FEDERATED DEPARTMENT STORES, INC., etc. et al.,

Defendants.

Argued and Submitted Dec. 4, 1984

Date Entered, Jan. 11, 1985

Appeal from the United States
District Court
Central District of California

Before: SNEED, ANDERSON and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

Ralphs Grocery Co. ("Ralphs") fired plaintiff Virginia Aragon ("Aragon") on December 1, 1981. Aragon, who was

represented in her employment and in the grievance procedures stemming from her dismissal by a Local of the Teamsters ("Local"), achieved a reinstatement in less favorable position, without backpay, and on condition that she relinquish any further claims, on March 12, 1982. Discontented with this result, Aragon sued Ralphs for breach of its collective bargainlng agreement in discharging her, and sued her union, the Local, for breach of its duty of fair representation in its pursuit of her grievance against Ralphs. In addition to this hybrid lawsuit against the union and the employer arising under the National Labor Relations Act, Aragon sued the Local's counsel for its alleged unsatisfactory work on her behalf.

It is the district court's judgment against Aragon and in favor of these few defendants, on these few claims, that Aragon now challenges on appeal. Aragon argues that the six-month statute of

limitations prescribed by section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(b), which applies to hybrid suits against a union for breach of its duty of fair representation and against an employer for breach of its collective bargaining agreement, should not be applied retroactively to bar her suit against the Local. Construed liberally, Aragon's assertion on appeal that this statute of limitations should be tolled as to Ralphs may be construed as a claim that the six-month statute of limitations referred to above should not be applied retroactively to bar her suit against her former employer, Ralphs. The resolution of these two claims depends in part on whether DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), which held that the six-month statute of limitations contained in the NLRA applies to hybrid suits of this sort, should be applied retroactively; and

in part on whether prospective application of DelCostello would leave Aragon with a shorter or longer applicable state statute of limitations in DelCostello's stead.

Aragon also claims that she is entitled to damages for emotional distress based on the union's breach of its duty of fair representation. Additionally, she argues that her malpractice claim against the Local's counsel should not have been dismissed. In connection with this malpractice claim, Aragon asserts: (1) it should have been remanded; (2) it was not preempted by federal labor law; (3) she alleged facts sufficient to withstand a motion to dismiss; and (4) if the district court chose not to remand, it should have exercised pendent jurisdiction over this claim. Finally, Aragon seeks attorneys fees and costs of suit of this appeal.

FACTUAL AND PROCEDURAL HISTORY

Aragon worked for Ralphs for over fourteen years. Her employment commenced

on May 1, 1967, and Ralphs discharged her on December 1, 1981. At the time of her discharge, Aragon was a cheese packer earning $11.95 an hour.

A written collective bargaining agreement between Ralphs and the Local was in force at the time of Aragon's termination. It controlled the terms and conditions of her employment as well as the grievance and arbitration procedure to be followed at her discharge.

The Local filed a grievance on Aragon's behalf. The grievance was heard, and decided, on March 12, 1982. It resulted in Aragon's reinstatement without backpay on March 15, 1982. This time, she started a different job, on night shift rather than day shift, and she relinquished all her claims against Ralphs. She eventually left this job on April 2, 1982.

The Local and Aragon seem to agree that Aragon's cause of action accrued on March 12, 1982, when her termination grievance

was settled at the hearing. Aragon filed her complaint in state court on March 24, 1983. The original complaint, however, was never served on any defendants. Aragon filed and served her first amended complaint on or about August 2, 1983.

All defendants named in the first amended complaint joined together and timely removed that action from the Superior Court to the United States District Court on August 31, 1983. The district court ruled against Aragon and in favor or all defendants on motions for summary judgment, for partial summary judgment, or to dismiss.

The district court granted summary judgment in favor of defendants Federated Department Stores, Inc. dba Ralphs Grocery Co. (Ralphs), Food Employers Council, Inc., Donald S. Prayzich, and Bob Rivera on each of Aragon's claims. As to these defendants, the court held: (1) the six-month statute of limitations prescribed

applies by §10(b) of the NLRA, which applies to individual claims of breach of a collective bargaining agreement (DelCostello), barred Aragon's claim for breach of the collective bargaining agreement because it applied retroactively; and (2) federal labor law preempted each of Aragon's remaining state tort claims (breach of the implied covenant of good faith and fair dealing, misrepresentation preventing employment, malpractice, fraud, and intentional infliction of emotional distress).

The district court also granted partial summary judgment in favor of the defendant Local. As to this defendant, the court held that the NLRA's six-month statute of limitations, because it applied retroactively, also barred Aragon's breach of the duty of fair representation claim. Finally, the district court granted the motion to dismiss of the Local's counsel, who represented her Aragon in grievance and

arbitration proceedings, for failure to state a claim upon which relief could be granted.

In her appeal, Aragon abandons several of her claims against other defendants. She also abandons several of her state law claims against the defendants who remain in the case. Thus, the only state law claim remaining on appeal is the malpractice claim against Counsel. The federal law claims remaining on appeal revolve around the appropriate statute of limitations to apply to the claims against Ralphs and the Local.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir.1984) (citation omitted). "Summary judgment is improper if tolling of the statute of limitations requires the resolution of disputed factual issues." Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th

Cir.1983). "The search for the appropriate statute of limitations is a decision of law. Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036, 1039 (9th Cir.1983) cert. denied, 104 S.Ct. 1599, 80 L.Ed. 2d. 130 (1984) (citation omitted). In this case, there are no relevant contested issues of fact as to either the tolling issue or the statute of limitations issue. Thus, we review these questions of law de novo.

"A ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a ruling on a question of law, freely reviewable by the court of appeals." Ray v. Union Bank, 725 F.2d 478, 479 (9th Cir.1984). A motion to dismiss should not be granted unless it appears to a certainty that the plaintiff can prove no set of facts in support of his or her claim that would show entitlement to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957), 78 S.Ct. 99, 101-102, 2

L.Ed.2d at 479 Rae v. Union Bank, 725 F. 2d at 479. Thus, the district court's dismissal of Aragon's malpractice claim against Counsel is freely reviewable by this court.

DISCUSSION

1. Which statutes of limitations governs Aragon's claim against the Local for breach of its duty of fair representation and against Ralphs for breach of its collective bargaining agreement, when the claim accrued on March 12, 1982?

Aragon claims that Ralphs breached its collective bargaining agreement with the Local by firing her. The parties do not dispute the facts relevant to determining whether Aragon's complaint was timely filed. Ralphs discharged Aragon on December 1, 1981. The Local filed a grievance on Aragon's behalf. The grievance was heard, and decided, on March 12, 1982. It resulted in Aragon's

reinstatement without backpay on March 15, 1982. This time, she started a different job, on night shift, other than day shift and she relinquished all her claims against Ralphs.

The Local asserts--and Aragon explicitly assumes as true--that Aragon's cause of action accrued on March 12, 1982, when her termination grievance was settled at the hearing. Cf., Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 561 and 562 n. 2 (9th Cir.1984); Price v. Southern Pacific Transportation Co., 586 F.2d 750, 754 (9th Cir.1978).

After reinstatement, Aragon resigned on April 2, 1982. Aragon claims that she was forced to resign on this later date, and thus, that her resignation amounted to a constructive discharge. Aragon filed her complaint in this law suit on March 24, 1983. This was over fifteen months after her discharge, a little more than one year after her cause of action accrued, and

almost one year after her subsequent resignation. The original complaint, however, was never served on any defendant. Aragon filed and served her first amended complaint on or about August 2, 1983. The parties seem to treat the March 24, 1983 date as the commencement of suit. As the discussion below reveals, however, both dates fall outside the statutes of limitations.

In DelCostello, the Supreme Court held that suits for breach of a union's duty of fair representation and suits for an employer's breach of a provision of a collective bargaining agreement shall both be subject to the six-month statute of limitations period of §10(b) of the NLRA, 29 U.S.C. §160(b). Aragon argues that DelCostello should not be applied retroactively to bar her suit, whose filing date admittedly falls outside the six month period. The Local argues that DelCostello should be applied retroactively to bar

Aragon's suit or, if the six-month statute of limitations does not apply retroactively, then the applicable state statute of limitations is even shorter and would still bar Aragon's suit.

Until a few weeks ago, this circuit had forcefully, repeatedly, and uniformly denied DelCostello retroactive application. The following quote of an entire per curiam opinion exemplifies this uniformity:

> Plaintiff appeals from the district court's grant of summary judgment in this action, finding it barred by the forth in DelCostello....
>
> The action was removed to federal court in 1981. This court has previously held that DelCostello does not apply retroactively. Barina v. Gulf Trading and Trasportation Co., 726 F.2d

560 (9th Cir.1984); McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir.1984); Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir.1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1599.

We reverse and remand for a determination on the merits.

Rodriquez v. Union Carbide Corp., 735 F.2d 365, 365-66 (9th Cir.1984) (only citations are omitted).

Application of this blanket rule would deny DelCostello retroactive application. The six-month federal statute of limitations would thus be inapplicable; the relevant state statute of limitations would govern.

A very recent case, however, has fashioned a limited exception to this rule. Glover v. United Grocers, Inc., 746 F.2d

1380 (9th Cir.1984), applied DelCostello retroactively. The court explained: "Where we have refused retroactive application in the past its effect would have been to shorten the applicable state statute....The retroactive effect of DelCostello is to lengthen, not shorten, the time in which Glover could have filed." If the state statute applicable to Aragon's were shorter than the six-month statute of limitations, then this exception would make the federal six-month statute of limitations applicable. Aragon's claim would then be time barred.

Thus, the relevant inquiry is which state statute of limitations governed Aragon's claim against the Local and against Ralphs on March 12, 1982, the day that her cause of action accured. If the state time limit was less than six months, then the six-month federal statutue of limitations would govern; Aragon's claim would fail. If the state time limit was

greater than six-months, then it would govern; the viability of Aragon's claim would depend on how much time that state statute of limitations gave her.

The answer with respect to suits against employers seemed clear for several years. The statute of limitations applicable to a defendant employer in a hybrid cause of action, like Aragon's, which accrued on March 12, 1982, was California's 100-day limit on filing suit to vacate an arbitration award, Cal.Civ.Proc.Code section 1288. McNaughton v. Dillingham Corp., 707 F.2d 1042, 1047 (9th Cir.1983), cert. denied, 53 U.S.C.W. 3289 (U.S. October 15, 1984); ("McNaughton I"); Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1353 (9th Cir.1981).

Aragon's claim against Ralphs is therefore time barred whether DelCostello applies retroactively or not.

The law of this circuit has been in a state of dissaray, however, as to which

state statute of limitations governs claims against a defendant union in a hybrid cause of action against an employer and a union accruing on March 12, 1982. A brief history will illustrate the confusion.

On November 24, 1978, Price v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978), held that the statute of limitations in a hybrid suit under the Railway Labor Act was three years in California. This time limit was supplied by California's statute of limitations on actions on liability created by statute, Cal.Civ.Proc.Code section 338. Price, 586 F.2d 753.

On April 20, 1981, the Supreme Court decided United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). The Court held that the extremely short time limit applicable to actions to vacate arbitration awards--90 days under the New York statute at issue, 100 days in California--applied to hybrid suits of this type. Id, at 64.

That decision applied explicitly only to defendant employers; only the defendant employer appealed and raised the issue. The decision was, however, written in broad terms, and seemed to imply in dicta that this short time period should govern suits against defendant unions as well. Indeed, Mitchell's broad terms generated some of the confusion in later cases decided in our circuit.

On August 13, 1981, this circuit decided Singer v. Flying Tigers Line, Inc., 652 F.2d 1349 (9th Cir.1981). The Singer court held that, under the Railway Labor Act: "as Mitchell requires,...we shall treat suits against a union for a breach of the duty of fair representation and against an employer for a breach of a collective bargaining against an employer for a breach of a collective bargaining agreement under this [100-day, vacation of arbtiral awards]...limitations statute." Singer, 652 F.2d at 1353. (The distinction between

suits arising under the Railway Labor Act, like Price and Singer, and suits arising under the NLRA, like Mitchell and Aragon, is irrelevant for our purposes. See Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 563 n. 6 (9th Cir.1984). Singer thus held, based on reading Mitchell's dicta as binding precedent, that the statute of limitations applicable to defendant unions was 100 days.

Then came March 12, 1982, the day that Aragon's claim accrued. According to Singer, but not necessarily to Mitchell, Aragon had 100 days to file suit--and she missed her deadline.

On June 7, 1983, one day before the Supreme Court decided DelCostello, this circuit decided McNaughton I, 707 F.2d 1042. The court in this case recognized the error in Singer and undertook to "correct this error." McNaughton I at 1047 n. 6. In place of the 100-day, state vacation of arbitration award limit,

McNaughton I substitued Oregon's two year malpractice statutes of limitations. (The McNaughton I decision made no mention of Price's previously controlling holding that actions of this sort against a union are governed by state statutes of limitations on actions created by statutes, rather than by state statutes of limitations on malpractice actions.) The claimant's cause in McNaughton I, which accrued on January 16, 1981, was therefore timely filed nine months later on October 20, 1981. Of course, January 16, 1981, the date of accrual, is both pre-Singer's implication that the 100-day time limit applies and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer-and pre-McNaughton I's holding that a longer statute of limitations applied.

DelCostello was decided by the Supreme Court on June 8, 1983, one day after McNaughton I. Its decision that the

federal, six-month statute of limitations is applicable in these cases does not affect this short history of the applicable California statute of limitations on March 12, 1982.

On November 3, 1983, Edwards v. Teamsters Local Union No. 36, 719 F2d 1036 (9th Cir. 1983) was decided. Although the Edwards cited court McNaughton I, it ignored McNaughton I's holding that Oregon's two-year malpractice statute of limitations applied to claims against unions. Instead, Edwards held: "we reaffirm [!] Price's [pre-McNaughton] holding that the California statute of limitations applicable to a suit against a union for breach of the duty of fair representation is the three year statute for actions 'upon a liability created by statute,' provided by Cal.Civ.Proc.Code section 338(1)." Edwards, 719 F.2d at 1040. Of course, in Edwards, the date of accrual of claimant's action was early

1981. This date of accrual, like the date of accrual in McNaughton I, is both pre-Singer's implication that the 100-day time limit applies and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer; pre-McNaughton I's holding that a longer, but different statute of limitations upon actions based on statutes applied.

The time period with which we are faced--actions accruing after Singer but before McNaughton I--has not yet been addressed by any of these cases. Nor does the next case in this history address the time period in which Aragon's claim falls. That next case is McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir.1984) ("McNaughton II"), decided on January 4, 1984. McNaughton II both reaffirmed McNaughton I (which applied the two year malpractice statute of limitations to actions against unions) and cited the recently decided Edwards case (which

applied the three year statute of limitations on actions based on statutes to actions against unions) with approval. Thus, McNaughton II adds no further insight to the statute of limitations applicable to the date of Aragon's case.

The next case in the history is Barina v. Gulf Trading and Transportation Co., 726 F.2d 560 (9th Cir.1984), decided on February 23, 1984. The Barina court declined to apply DelCostello or Mitchell retroactively; the longer state statute of liitations therefore governed, but the court did not specify which statute of limitations that was. The date of accural of claimant' cause of action in Barina was July 12, 1980. Id. at 562 n. 2. This date of accrual, like the date of accrual in McNaughton I and in Edwards, is: pre-Singer's implication that the 100-day time limit applies; and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer;

pre-McNaughton I's holding that a longer malpractice statute of limitations applied; pre-Edwards' holding that a longer, but different statute of limitations upon actions based on statutes applied; and pre-Barina's holding that a longer, but unspecified statute of limitations applied.

Scoggins v. Boeing Co., 742 F.2d 1225 1984, follows the same pattern: a three year statutes of limitations, under Washington State law, is applied to the action against the union; claimant's cause of action accrued, however, in August of 1980. Id, at 1228.

Several weeks ago, this circuit decided a case whose facts parallel the facts of our case. In Glover, the claimant's cause of action accrued on August 9, 1982. This falls within the same window within which Aragon's accrual falls: post-Singer's holding that the 100-day statute of limitations applied; pre-McNaughton I's holding that a longer malpractice statute

of limitations applied; and pre-Barina's holding that a longer, but unspecified statute of limitations applied. Thus, Glover would seem to control this case; it held that the applicable California statute of limitations was 100 days.

Glover, however, fails to address one thing: this circuit has called the Singer holding incorrect. It was not simply amended or improved upon. It was basically overruled. This is what became of Singer's 100-day holding:

> In Singer...,a panel of this circuit believed that the rule in Mitchell extended to suits against the union....The [Singer] court's belief that Mitchell's holding applied to actions against a union for unfair representation apparently was based on an erroneous assumption that the union as

> well as the employer had appealed from the ruling of the court of appeals....We now correct this error.

McNaughton I, 707 F.2d at 1047 n. 6.

This court now faces a choice. We can follow Glover and hold that Aragon's suit against the Local and Ralphs is time barred under both the applicable 100-day state statute of limitations and the longer, six-month, federal time limit, applied retroactively. Or, we can address the issue that the Glover court declined to address: whether Singer should continue to bar claims against unions by its application of the extremely short 100-day statute of limitations, despite the acknowledged error of that holding.

We choose the first approach. It comports with Glover, decided just a few weeks ago, and thus adds some needed consistency to this area of the law. It also comports with the federal labor

relations policy that: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA section 7, 29 U.S.C. section 157. Untangling our past web of decisions and revealing that two widely divergent statutes of limitations--100-days on actions against employers and three years on actions against unions--governed during this shadowy period between Singer and McNaughton I would serve no useful purpose. It would only penalize the union and reward the employer for problems that arise, initially, only because of the employer's alleged breach of a collective bargaining agreement. The law of this circuit can be construed as applying that same statute of limitations to actions

against both unions and employers at the time that Aragon's claim arose; we choose that construction. We therefore affirm the district court's grant of summary judgment in favor of defendants Ralphs and the Local on the §301 claim. Thus, we need not address Aragon's argument that she is entitled to damages of emotional distress on her breach of duty of fair representation claim.

2. This short statute of limitations should not be tolled in this case.

On appeal, Aragon makes only one reference to tolling. She lists, as her last issue, "Whether the statutes of limitation on plaintiff's cause of action against RALPHS should be tolled." She never addresses the issue, never cites to any authority on this issue, and never raises any facts to justify tolling in her case. Her claim also fails on the merits.

Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030 (9th

Cir.1983), controls the disposition of this issue. In Hub the union--rather than an individual, like Aragon--sued the employer to enforce a collective bargaining agreement. That case, which was decided one day before DelCostello was decided, held that when a federal court borrows a state statute of limitations in claims arising under the Labor Management Relations Act, 29 U.S.C. section 185, the federal court may also borrow the state's tolling provisions. DelCostello, decided one day later, held that the federal courts shall not borrow the states statute of limitations in actions against the employer and the union; thus, the federal courts may also be precluded from borrowing the state's tolling provisions. If, however, it is appropriate to borrow California's tolling provisions, Hub sets the analytical frame work for doing so in a labor law case.

California equitably

tolls the statute of

limitations during the pendency of an earlier action if there is "timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff."

...The two actions [upon which the claimant basis the claim for benefit of equitable tolling] need not be indentical....

Equitable tolling should not be applied in a manner that frustrates national labor-management policy. We believe that policy is fostered by having the NLRB attempt to resolve an issue before a party resorts to a section 301 action. Thus, if tolling is appropriate in this case, it would not be

> inconsistent with the constitution or with the applicable federal labor laws.

Id. at 1033 (citations omitted). In Hub, the union filed an unfair labor practice charge with the NLRB years before it sued Hub for damages in federal court. The existence of these two actions meant that: (1) tolling the statute of limitations did not impede, but actively promoted, the federal policy of "having the NLRB attempt to resolve an issue before a party resorts to a section 301 action"; (2) the first action, though not identical to the second, provided the employer with the notice and lack of prejudice necessitated by state law; and (3) the first action showed the plaintiff's reasonable and good faith conduct. Thus, the statute of limitations was tolled.

In Aragon's case, however, no comparable filing by Aragon promoted federal labor concerns, notified the

employer about the possible pendency of this action, or showed plaintiff's reasonable and good faith pursuit of her remedies. The only official action that she took that could possibly be construed as promoting federal policy thereby allowing this court to apply California's tolling provisions, is filing claims for unemployment benefits and pursuing these claims through appeal. In fact, it is this action that Aragon raised as a basis for tolling in the district court. These actions do not, however, rise to the level of promoting national labor-management policies in the same way that pursuing claims with the NLRB does. Nor do they notify an employer of the possible pendency of a law suit or show plaintiff's reasonable pursuit of her remedies. Thus, it would be inappropriate to toll Aragon's cause of action against Ralphs.

///

3. The District Court Erred In Dismissing Aragon's Malpractice Claim Against The Local's Counsel.

The district court dismissed Aragon's malpractice claim against Counsel for failure to state a claim under Fed.R.Civ.Proc. 12(b)(6). Aragon argues that the claim should not have been dismissed. She asserts that her state malpractice claim is not preempted by federal labor law; that it alleges facts sufficient to withstand a motion to dismiss; and thus that the district court shall have either retained the claim under its pendent jurisdiction or remanded the claim to state court. Counsel asserts that Aragon's claim arises under federal law and was properly removed to federal court, but that it was correctly dismissed for two reasons: (1) it was preempted by federal labor law and, (2) it failed to state a cause of action.

///

a. Federal Law Does Not Preempt The Malpractice Claim

The test for preemption in the labor law field demands that a balance be struck between competing interests.

> [T]he cases reflect a balanced inquiry into such factors as the nature of the federal and state interest in regulation and the potential for interference with federal regulation. As we said said in Vaca v. Sipes, 386 U.S. [17] at 180 [1967], our cases "demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of

concurrent juducial and administrative remedies."

Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290, 300-01, (1977).

Based on this balance, federal law preempts a state tort suit by an employer for damages arising from the peaceful picketing of the company by labor unions, because this conduct is regulated by NLRA sections 7 and 8. 29 U.S.C. sections 157 and 158. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-48, 79 S.Ct. 773, 779-81, 3 L.Ed.2d 775 (1958). Federal law similarly preempts a state tort suit against a union complaining of the union's hiring practices and the complainant's resulting inability to obtain employment. This conduct was also regulated by NLRA sections 7 and 8. Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 694-95, 83 S.Ct. 1423, 1425-26, 10 L.Ed.2d 638 (1963).

Federal law also preempts a former union member's law suit against his union for dismissing him from the union and procuring his dismissal from employment, where the resolution of the issue depends on the construction of the collective bargaining agreement and the unlon constitution. In such a case, again, the conduct "was arguably protected by section 7 or prohibited by section 8 of the [NLRA]." Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 293, 91 S.Ct. 1909, I921, 29 L.Ed.2d 473 (1971).

Federal law does not, however, preempt a state tort action for infliction of emotional distress, where the action meets the strict requirement "that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the

actual or threatened discrimination itself." Farmer, 430 U.S. at 305, 97 S.Ct. at 1066. Nor did federal law preempt the cause of action asserted in International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.ed.2d 1018 (1958).

> Gonzales was a suit against a labor union by an individual who claimed that he had been expelled in violation of his contractual rights and who was seeking restoration of membership....
>
> The Gonzales decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of

> employment, and that the principle relief sought was restoration of union membership rights.

Borden, 373 U.S. at 696-97, 83 S.Ct. at 1427. This circuit, in Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir.1984), petition for cert. filed, 53 U.S.L.W. 310 (June 27, 1984), held that plaintiff's claim that he had been wrongfully discharged in violation of California State Public Policy also withstood a preemption challenge.

Garibaldi sets the analytical framework for determining whether federal law preempts Aragon's malpractice claim Lucky Food Stores fired Garibaldi. Garibaldi sued for damage in state court alleging that he was wrongfully discharged in violation of state policy.

The action was removed to federal court; this circuit then decided that the action was improperly removed, and that the

district court lacked jurisdiction. Id., at 1368.

The threshold issue in Garibaldi, like in all removal actions, was whether the removal jurisdiction was properly based on a federal claim stated in the complaint.

> However, where the state claim has been preempted by federal law, it does not follow that the federal court has jurisdiction. The circuit has repeatedly held that preemption, as a defensive allegation, is not grounds for removal....
>
> Although ordinarily a preempted claim may not be removed to federal court, the "artful pleading" doctrine provides the rationale for the assertion of federal jurisdiction in some cases....This doctrine allows

> the removing court to look at the true nature of the plaintiff's complaint when the plaintiff has attempted to avoid a federal cause of action by relying soley on state law in the complaint....We have followed this doctrine in allowing removal based on preemption in certain labor cases....
>
> Lucky Food Stores asserts that the suit is properly removed under the artful leading doctrine because Garibaldi's claim is preempted. However, Lucky Food Stores has missed the second step in analysis.

Id. at 1370 (citations omitted). That second step is looking at the true nature of the plaintiff's complaint. See also Hunter v. United Van Lines, No. 83-5911,

slip op. 4910 at 4919 (9th Cir.November 5, 1984) (Garibaldi made it clear that a state-law claim may be recharacterized as a federal claim only when the state-law claim is preempted by federal law and when it is apparent from a review of the complaint that the federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered,") (emphasis in original).

In Garibaldi, the court held that Garibaldi's allegation that he was discharged in violation of public policy comports with the limitations of the Farmer holding." 726 F.2d 1374. Federal law did not preempt the wrongful discharge claim, and removal was improper. The court stated:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does

> not alter the economic relationship between the employer and employee. The remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It further's the state's interest in protecting the general public--an interest which transcends the employment relationship.

Garibaldi, 726 F.2d at 1375 (emphasis in original).

The state malpractice claim that Aragon brings also falls within the limitations of the Farmer holding. It poses no significant threat to the collective bargaining process; the defendant is not even a party to the collective bargaining agreement. See Pedro v. Teamsters Local 490, 509 F.Supp. 83,85 (N.D.Cal.1981)

("labor organizations...and employers are the only proper defendants in action under" the NLRA; the union's attorneys are not). The malpractice claim does not alter the economic relationship between employer and employee; it alters only the relationship between the former employee and a wholly separate entity, the union's counsel. The remedy is in tort, and it is based on the standard of care the attorney owes the client; it is not a contractual remedy under a collective bargaining agreement. It also furthers the state's interest in protecting the public from legal malpractice, an interest that transcends labor law.

The few factually similar cases decided in this circuit are in accord with this conclusion. [1] In Pedro v. Teamsters Local 490, 509 F.Supp. 83 (N.D.Cal.1981), a discharged employee brought a suit against his employer for breach of the collective bargaining agreement, against the union for

breach of the duty of fair representation, and against the union's attorneys who were retained to represent him in the arbitration proceedings. The court characterized the action against Pedro's attorneys as a state malpractice claim, and went on to hold that because this claim added the attorneys as defendants, "the...claim changes from a mere pendent parties claim to a claim adding pendent parties, as to whom there is no independent basis for federal subject matter jurisdiction." Id. at 85. This circuit's strong policy against pendent party jurisdiction formed the basis for the court's holding that pendent party jurisdiction was lacking as to the attorneys. The court concluded, however, that [p]laintiff also is not without remedy in state court on his claims against the lawyer defendants." Id. at 86.

In Weitzel v. Oil Chemical & Atomic Workerss International Union, 667 F.2d 785

(9th Cir.1982), Weitzel filed suit against his union for breach of the duty of fair representation and against the union's law firm for legal malpractice. This circuit affirmed the district court's dismissal of the claim against the union, but reversed the dismissal of the claim against the attorneys. "We conclude that summary judgment was inappropriate because genuine issues of fact remained in the case, both as to the breach of an attorney-client relationship and to causal relationship of the breach, if any, to the plaintiff's alleged lack of success. Id. at 787. Thus, these decisions also support the conclusion that Aragon's malpractice claim is not preempted.

Because federal law neither preempts the state malpractice claim nor provides an independent federal remedy in its place, the district court erred both in retaining jurisdiction over this state law claim and in dismissing it for failure to state a

claim.

b. Aragon's Malpractice Claim Should Have Been Remanded To The State Court

Pendent jurisdiction depends upon the federal court's jurisdiction over one claim, to which the second, nonfederal claim may be appended.

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a [federal] claim..., and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court.

United Mine Workers v. Gibbs, 383 U.S.

715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (footnote omitted; emphasis in orignal). See also Pedro, 509 F.Supp. at 85.

Aragon's federal claim against the LocaL for breach of its duty of fair representation and against Ralphs for breach of the collective bargaining agreement are timebarred. Thus, no independent federal claim confers subject matter jurisdiction on the federal court. Without a federal claim upon which to append the related state cause of action, the federal court has no basis for asserting jursidiction over Aragon's malpractice claim. But see, Weitzel, 667 F.2d 785, 787 (appellate court reversed and remanded--apparently to the district court--the former employee's malpractice claim against the union's law firm for the determination of a factual issue as to whether an attorney-client relationship existed and for a related state law issue

regarding the statute of limitations). Pendent jurisdiction is therefore inappropriate in Aragon's case.

Because Aragon's malpractice claim was not preempted by federal law, and because there exists no independent basis of federal jurisdiction over Aragon's hybrid claim against the Local and Ralphs, the district court had no jurisdiction over this claim. It should be remanded to the district court with instructions to remand to the California state court. It is the province of that state court, not the district court, to determine whether Aragon has alleged facts sufficient to withstand a motion to dismiss.

See Garibaldi, 729 F.2d 1367, 1376 ("Removal [of state wrongful discharge claim] was improper. Because the district court had no jurisdiction over this case, we reverse and remand to the district court with instructions to remand to the California state court.")

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

1. In Sklios v. Brotherhood of Teamsters and Auto Truck Drivers Local 70 of Alameda County, 503 F.Supp. 123 (N.D.Cal.1980), however, the court held that the state tort and contract claims asserted against all defendants--including the attorneys--were preempted by federal labor law. Id. at 124-25. "[T]he conduct alleged as as-basis for the state law claims--wrongful discharge as the result of collusion between the employer and the union--clearly falls within the purview of federal labor regulation." Id. at 125. However, it appears that no separate state malpractice claim was brought against attorneys in that case. More importantly, the decision in that case was reversed on appeal, without a published opinion. 672 F.2d 923 (9th Cir.1982).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA ARAGON, Plaintiff, vs. FEDERATED DEPARTMENT STORES, INC., et al., Defendants.	)	NO. 83-6435 DC No. CV 83-5647-R ORDER DENYING REHEARING EN BANC Date Entered: May 16, 1985

Before: SNEED, ANDERSON and FERGUSON, Circuit Judges.

The panel as constituted in the above voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the

suggestion for rehearing en banc. Fed. R. App. P. 35.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "C"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 83-5647-R

VIRGINIA ARAGON, Plaintiff

vs.

FEDERATED DEPARTMENT STORES, INC., etc., et al.,

Defendants.

Date Entered, Dec. 7, 1983

ORDER GRANTING MOTION TO DISMISS

This cause having come on to be heard on the Motion of defendants PAPPY, VOGEL, KAPLON AND PHILLIPS, a professional corporation and RALPH M. PHILLIPS to dismiss all causes of action in the amended complaint herein on the basis of Rule 12(b)(6), the Court, having considered the pleadings, points and authorities, exhibits

and declarations submitted in support and an opposition thereof:

NOW, THEREFORE, by reason of the law and findings of aforesaid;

IT IS ORDERED, ADJUDGED AND DECREED:

1. That these defendants' motion to dismiss all causes of action of the first amended complaint in the instant proceding on the basis of Rule 12(b)(6) of the Federal Rules of Procedure is hereby granted.

DATED: _____

_____
UNITED STATES
DISTRICT COURT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 83-5647-R

VIRGINIA ARAGON, Plaintiff,

vs.

FEDERATED DEPARTMENT STORES, INC., etc., et al.

Defendants.

Date Entered, Oct. 18, 1983

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing before the Court, the Honorable Manuel L. Real, Chief District Judge, presiding, on the Motion of defendants Federated Department Stores, Inc., Food Employers Council, Inc., Donald S. Prayzich, and Bob Rivera, made pursuant to Rule 56, Federal Rules of Civil Procedure, for a summary judgment in their

favor as to each claim asserted by plaintiff in this section. The Court, having considered the Motion of said defendants, the Memorandum of Points and Authorities and Declaration filed in support thereof, the papers filed in opposition to said Motion, and the argument presented at the hearing on the Motion, does hereby make the following:

FINDINGS OF FACT

1. Plaintiff filed her original Complaint in this action on March 24, 1983.

2. The original Complaint was not served upon or received by any defendants.

3. Plaintiff filed her First Amended Complaint on or about August 2, 1983.

4. Defendant Federated Department Stores, Inc., first received a copy of

plaintiff's First Amended Complaint on August 2, 1983.

5. Defendants Food Employers Council, Inc., Donald S. Prayzich, and Bob Rivera first received a copy of the First Amended Complaint after August 2, 1983.

6. All defendants named in the First Amended Complaint joined together and timely removed that action from the Superior Court to the United States District Court on August 31, 1983.

7. Plaintiff's First Amended Complaint alleges she was wrongfully discharged from her employment with defendant Federated Department Stores, Inc., on December 1, 1981.

8. Plaintiff's First Amended Complaint alleges that at all times pertinent, there was a collective

bargaining agreement in effect between Federated Department Stores, Inc. and Local Union No. 572, which provided plaintiff the right to an arbitration of her discharge.

9. Plaintiff's First Amended Complaint alleges that on April 2, 1982 she was forced by Local No. 572 to accept a settlement of her grievance, and give up her right to arbitration and to resign her employment with defendant Federated Department Stores, Inc. and that by doing so Local No. 572 breached its duty of fair representation.

10. Plaintiff's First Amended Complaint alleges that the manner of her dismissal and her alleged forced resignation has resulted in injuries predicated on five state tort theories. She alleges in her Second Cause of Action

that Federated Department Stores, Inc., Food Employers Council, Inc., and Donald S. Prayzich breached the implied covenant of good faith and fair dealing. Plaintiff alleges in her Third Cause of Action that Federated Department Stores, Inc., through its agents and employees, inflicted emotional distress upon her. In her Fourth Cause of Action plaintiff alleges a cause of action based on legal malpractice. Therein she alleges that defendants Donald S. Prayzich and Bob Rivera conspired with others to coerce plaintiff into accepting a settlement of her December 1, 1981 discharge. In her Fifth Cause of Action, plaintiff alleges that Federated Department Stores, Inc., and Bob Rivera gave false information to plaintiff's prospective employers regarding plaintiff's

termination, quality of her work, and her loyalty to Federated Department Stores, Inc. In her Sixth Cause of Action plaintiff alleges that Federated Department Stores, Inc., Donald S. Prayzich, and Bob Rivera conspired with others to prevent plaintiff from an arbitration hearing on her December 1, 1981 discharge, and to induce her to accept a settlement.

11. To the extent that any of the above findings of fact are determined to be concludsions (sic) of law, they are incorporated therein by reference.

CONCLUSIONS OF LAW

1. This is an action alleging, inter alia, breach of a collective bargaining agreement between an employer and an industry affecting interstate commerce (Federated Department Stores, Inc.) and a

union representing employees working in an industry affecting interstate commerce (Locan Union No. 527). This Court has jurisdiction of this action pursuant to Setion 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185.

2. Plaintiff's claims for breach of the collective bargaining agreement and breach by Local 572 of its duty of fair representation are both barred by the six months statute of limitations prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 221 (1983).

3. Plaintiff's five state law tort claims (breach of the implied covenant of good faith and fair dealing, misrepresentation preventing employment,

malpractice, fraud, and intentional infliction of emotional distress) are all based on the alleged breach by Federated Department Stores, Inc., and Bob Rivera of the applicable collective bargaining agreement and on the alleged breach of Local 572 of its duty of fair representation. The gravamen of each of these tort claims is a breach of the collective bargaining agreement, and a breach of the duty of fair representation by Local Union No. 572, therefore these State tort claims are inextricably intertwined with the federal claim under §301 and are preempted by the exclusive application of federal law to actions alleging breach of a collective bargaining agreement. Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980); Avco Corp.

v. Aero Lodge No. 735, Int'l. Assn'n. of Machinists and Aerospace Workers, 376 F.2d 337 (6th Cir. 1967), aff'd, 390 U.S. 557, 88 S.Ct. 1235 (1968); Brice v. McDonnell Douglas Corp., 111 LRRM 2031 (1982), appeal docketed, No. 82-5925 (9th Cir. Sept. 27, 1982); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930, 99 S.Ct. 318 (1979).

4. There remain no genuine issues of material fact.

5. Judgment shall be rendered in favor of defendants Federated Department Stores, Inc., Food Employers Council, Inc., Donald S. Prayzich, and Bob Rivera on all claims asserted by plaintiff in this action.

6. To the extent that any of the above conclusions of law are determined to be findings of fact, they are incorporated

therein by reference.

DATED:

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA ARAGON, Plaintiff, vs. FEDERATED DEPARTMENT STORES, INC., et al., Defendants.	NO. 83-6435 DC No. CV 83-5647-R FIRST AMENDED COMPLAINT FOR DAMAGES AND REINSTATEMENT Date Filed: August 2, 1983

FIRST CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AND REINSTATEMENT UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT (29 USC SEC. 185) AGAINST FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY FOR WRONGFUL DISCHARGE AND AGAINST LOCAL UNION NO. 572 FOR TORTIOUS BREACH OF THE

DUTY OF FAIR REPRESENTATION

1. Plaintiff, VIRGINIA ARAGON, is an individual residing in the City of Baldwin Park, County of Los Angeles, State of California.

2. Defendant FEDERATED DEPARTMENT STORES, INC., is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Delaware and was authorized to transact business, and was transacting business within the State of California.

3. Plaintiff began her employment relationship with the business entity known to her as RALPHS Grocery Company on May 1, 1967. Plaintiff is informed and believes and thereon alleges that on or about January 1970, the business entity known to her as RALPHS Grocery Company merged with or was acquired by defendant FEDERATED DEPARTMENT STORES INC. Defendant FEDERATED DEPARTMENT STORES, INC., continued the operation of such business enterprise under

the fictitious name of RALPHS Grocery Company. There was substantial similarity of operation and continuity of identity of the business enterprise both before and after merger or acquisition by defendant FEDERATED DEPARTMENT STORES, INC. and therefore any employment contract or collective bargaining agreement between plaintiff and her predecessor employer is binding upon defendant FEDERATED DEPARTMENT STORES, INC. For convenience in pleading, defendant FEDERATED DEPARTMENT STORES, INC. shall hereinafter be referred to as "RALPHS". Plaintiff was continuously employed by said predecessor employer and successor employer, defendant RALPHS from May 1, 1967 until April 2, 1982, when she was unlawfully forced to resign, as more specifically hereinafter alleged.

4. Defendant RALPHS is and was engaged in the production and distribution of food items, with its principal office and place of business located at 1100 West

Artesia Boulevard, City of Compton, County of Los Angeles, State of California. At all times material to this action, defendant RALPHS was engaged in an industry which substantially affected interestate commerce.

5. At all times herein mentioned defendant BOB RIVERA, hereinafter referred to as "RIVERA", was employed by defendant RALPHS in the capacity of supervisor of its deli-kitchen department and in doing the things hereinafter alleged was acting within the course and scope of such employment and agency. Furthermore, the arbitrary, malicious, oppressive and discriminatory actions directed against plaintiff by defendant RIVERA, as hereinafter alleged were urged, approved, confirmed, ratified and adopted by defendants RALPHS.

6. Defendant FOOD EMPLOYERS COUNCIL, INC., hereinafter referred to as "EMPLOYERS COUNCIL", is and at all times herein mentioned was a labor association organized

and existing under the laws of the State of California, with its principal place of business located at 2599 South Flower Street, City of Los Angeles, State of California.

7. Defendant DONALD S. PRAYZICH, hereinafter referred to as "PRAYZICH", is and was an attorney at law duly licensed to practice as such by the State of California. At all times herein mentioned defendant PRAYZICH was employed by defendant EMPLOYERS COUNCIL, and in doing the things hereinafter alleged was acting within the course and scope of such employment.

8. At all times herein mentioned defendant PRAYZICH was the attorney who represented defendant RALPHS in labor grievances and arbitration proceedings involving plaintiff, which are the subject of this action. Furthermore, the fraudulent, oppressive, and malicious actions directed against plaintiff by

defendant PRAYZICH, as hereinafter alleged, were urged, approved, confirmed, ratified and adopted by defendants EMPLOYERS COUNCIL and RALPHS.

9. Defendant LOCAL UNION NO. 572, hereinafter referred to as "UNION", with its principal office and place of business located at 450 East Carson Plaza Drive, City of Carson, County of Los Angeles, State of California, is and at all times herein mentioned was a labor organization representing employees in an industry affecting interestate commerce. Defendant UNION was chartered and is affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, and was engaged in, and had the duty of promoting and protecting the interests of its union members, including plaintiff.

10. At all times material to this action, defendant LOU DAVIS, hereinafter referred to as "DAVIS", was employed by

defendant UNION in the capacity of business representative, and in doing the acts and omissions hereinafter alleged was acting within the course and scope of said employment. Furthermore, the arbitrary, hostile, dishonest and discriminatory actions directed against plaintiff by defendant DAVIS were urged, approved, confirmed, ratified and adopted by defendant UNION.

11. Defendant PAPPY, VOGEL, KAPLON and PHILLIPS, hereinafter referred to as "LAW FIRM", is and at all times herein mentioned was a professional corporation organized and existing under the laws of the State of California and was duly registered with the State Bar of California as a law corporation, with its principal place of business located at 1730 West Olympic Boulevard, Suite 200, City of Los Angeles, State of California.

12. At all times herein mentioned defendant RALPHS M. PHILLIPS, hereinafter

referred to as "PHILLIPS", was an attorney at law, duly licensed to practice as such by the State of California. Defendant PHILLIPS was a member, agent and employee of defendant LAW FIRM, and in doing the acts and omissions hereinafter alleged was acting within the course and scope of such agency and employment. Defendants UNION and PHILLIPS held themselves out to plaintiff as specialists in labor law.

13. Plaintiff is informed and believes and thereon alleges that defendant LAW FIRM retained defendant LAW FIRM to represent its union membership, including plaintiff, in labor disputes and arbitration proceedings against defendant RALPHS.

14. At all times herein mentioned defendant PHILLIPS was the attorney who represented plaintiff in her December 1, 1981 discharge and in her April 2, 1982 forced resignation grievances and was plaintiff's attorney at her March 12, 1982 arbitration hearing.

15. The true names and capacities of defendants sued herein as DOES 1 through 100, inclusive, are unknown to plaintiff, who therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

16. At all times herein mentioned defendants DOES 1 through 25, inclusive, were agents and employees of defendant RALPHS; DOES 26 through 50, inclusive, were agents and employees of defendant EMPLOYERS COUNCIL; DOES 51 through 75, inclusive, were agents and employees of defendant UNION; DOES 76 through 100, inclusive, were agents and employees of defendant LAW FIRM; and in doing the acts and omissions hereinafter alleges were acting within the course and scope of their agency and employment and with the full knowledge, approval and permission of their respective employer.

17. At all times material to this

action, there was in full force and effect a written collective bargaining agreement entered into and executed by defendant RALPHS and defendant UNION which controlled the terms and conditions of persons employed by defendant RALPHS in its deli-kitchen department and who were also members of defendant UNION. Pursuant to this collective bargaining agreement defendant UNION was the sole and exclusive bargaining agent and representative for those persons employed by defendant RALPHS in its deli-kitchen department.

18. The collective bargaining agreement in pertinent provided that defendant RALPHS could not discharge an employee except for good cause and further that defendant RALPHS and defendant UNION would not discriminate against an employee on account of sex, age, or for upholding the principals of unionism. Said collective bargaining agreement also contained a grievance procedure whereby an

employee's discharge could be submitted to a neutral arbitrator for a hearing on the merits, and whose decision would be final and binding upon the parties.

19. At all times material to this action, plaintiff was employed by defendant RALPHS and was a member in goodstanding of defendant UNION.

20. In the years 1979 through 1982, numerous disputes arose between plaintiff and defendant RALPHS regarding the arbitrary, malicious, oppressive and discriminatory actions taken against plaintiff by her immediate supervisor, defendant RIVERA. Defendant RIVERA discriminated against plaintiff in the assignment or work duties; discriminated against plaintiff in that she was issued written warning without justification, whereas similar conduct by other employees was ignored; arbitrarily and discriminatorily ignored her seniority in layoff and rehiring matters; retaliated

against plaintiff for upholding the principles of unionism and for filing complaints with the State Department of Fair Employment and Housing, the National Labor Relations Board, and the Equal Employment Opportunity Commission; wrongfully discharged plaintiff without just cause on December 1, 1981; wrongfully demoted plaintiff in job classification from cheese packer to sanitation and changed her work shift from days to nights and intentionally created more oppressive and burdensome working conditions intending to force plaintiff to terminate her employment, and which did result in her forced resignation on April 2, 1982. The aforementioned actions of defendants RIVERA and RALPHS were grossly unjust; without good cause; against public policy, in breach of the implied covenant of good faith and fair dealing; and a willful breach of the collective bargaining agreement.

21. The reasons given by defendant RALPHS for plaintiff's December 1, 1981 discharge were dishonesty in production responsibilities and unsatisfactory work. Plaintiff alleges that the stated reasons for her discharge were false and were known by defendants RIVERA, RALPHS, DAVIS, UNION, PHILLIPS, LAW FIRM and PRAYZICH to be false. The real reason for plaintiff's December 1, 1981 discharge was for retaliation purposes because she would not permit defendant RIVERA to violate her rights under the collective bargaining agreement; because she engaged in concerted union activity; because she complained to defendant UNION and various governmental agencies about the harassment and discriminatory treatment directed against her by defendant RIVERA.

22. At all times while plaintiff was employed as aforesaid, except for minor indiscretions, she performed her duties in a proper and workmanlike manner. Plaintiff

complied with all terms and conditions of her employment contract and with the collective bargaining agreement, and to the extent possible, exhausted her contractual remedies provided for in the collective bargaining agreement.

23. During the years 1979 through 1982, plaintiff complained to her union representative, defendant DAVIS, and other UNION officials that her immediate supervisor, defendant RIVERA, was continuously acting toward her in an arbitrary, malicious, oppressive and discriminatory manner, as previously alleged in paragraph 20.

24. Immediately after her termination on December 1, 1981, plaintiff reported her wrongful discharge to defendant DAVIS and sought the assistance of defendant UNION in securing her reinstatement with defendant RALPHS. Thereafter, defendants RALPHS and UNION scheduled plaintiff's December 1,

1981 discharge for arbitration hearing on March 12, 1982.

25. In undertaking to represent plaintiff in such grievances and arbitration hearing, defendants UNION and DAVIS breached their duty of fair representation owing to plaintiff in the following particulars, among others:

a. In ignoring plaintiff's complaints of discrimination, harassment and abuse by defendant RIVERA;

b. In failing to conduct a proper investigation of the facts underlying plaintiff's December 1, 1981 discharge and plaintiff's forced resignation of April 2, 1982;

c. In failing to subpena witnesses and present evidence at the March 12, 1982 arbitration hearing which would have negated "good cause" for her December 1, 1981 discharge;

d. In accepting defendant RALPHS' version of the facts regarding plaintiff's

December 1, 1981 discharge without sufficient proof of wrongdoing or just cause;

e. That at the March 12, 1982 arbitration hearing, defendant DAVIS with full knowledge of plaintiff's dire mental, emotional, physical and economic distress, and in collusion with defendants RIVERA, PRYZICH, PHILLIPS and DOES 1 through 25, inclusive, coerced plaintiff into accepting a settlement of her December 1, 1981 discharge that was oppressive and unconscionable;

f. In refusing to take action to rescind or vacate the settlement agreement entered into on March 12, 1982, and to proceed with an arbitration hearing of her December 1, 1981 discharge despite plaintiff's request to do so.

26. The settlement agreement of plaintiff's December 1, 1981 discharge contained oppressive and unconscionable terms and plaintiff's apparent consent to

such settlement was obtained by taking unfair advantage of plaintiff's weak mental health and through deception, economic duress and undue influence exerted upon plaintiff by defendants RIVERA, PRAYZICH, DAVIS, PHILLIPS and DOES 1 through 25, inclusive.

27. The aforementioned actions of said defendants and each of them were fraudulent, arbitrary, dishonest, in bad faith and were committed with animosity towards plaintiff. Plaintiff alleges that had defendants DAVIS and UNION not breached their duty of fair representation, plaintiff would have been successful in securing reinstatement with defendant RALPHS at her former position of cheese packer with full back wages and benefits.

28. At the time of her wrongful discharge on December 1, 1981, plaintiff was employed by defendant RALPHS as a cheese packer in its deli-kitchen department, earning compensation at a rate

of $11.59 per hour. Plaintiff was first in seniority in said department, having worked for defendant RALPHS and its predecessor for over fourteen and one half years.

29. Plaintiff is ready, willing and able to work and desires reinstatement with defendant RALPHS to her former position as a cheese packer in its deli-kitchen department. Such reinstatement to be retroactive to the date of discharge without loss of wages, benefits or seniority.

30. As a proximate result of the plaintiff's wrongful discharge by defendant RALPHS and the tortious breach of the statutory duty of fair representation by defendant UNION, plaintiff has suffered loss of wages, loss of pension benefits, loss of insurance benefits and loss of other benefits she would have been entitled to had she not been wrongfully discharged. To date plaintiff has suffered in excess of $35,000 in loss of wages and benefits and

she will continue to suffer such damage for an indefinite period in the future.

31. As a proximate result of the wrongful and malicious discharge in violation of the collective bargaining agreement, and the union's breach of their statutory duty of fair representation, as previously alleges, and by reason of her lengthy unemployment, plaintiff has suffered and will continue to suffer severe mental, emotional and physical illness and distress, mental anguish, humiliation and embarrassment, all to her general damage in an amount according to proof at time of trial.

32. As a proximate result of the fraudulent, oppressive and malicious acts of the defendants and each of them, and her resulting physical and emotional injuries, plaintiff was compelled to, and did employ physicians, psychiatrists, psychologists, and other health care providers to examine, treat and care for her and she thereby

incurred medical and incidental expenses. Plaintiff is informed and believes and thereon alleges that she will require such care and treatment for an indefinite period in the future. The exact amount of such medical and incidental expenses, whether past, present or future is unknown at this time and plaintiff will amend this complaint to set forth said amounts when ascertained.

33. As a further proximate result of the wrongful discharge by defendant RALPHS and the breach of the statutory duty of fair representation by defendant UNION, plaintiff was compelled to, and did hire attorneys to secure and protect her rights under the collective bargaining agreement and thereby incurred and will continue to incur attorney fees and litigation expenses.

34. The acts of the defendants and each of them, leading to the plaintiff's wrongful discharge on December 1, 1981, and to her forced resignation on April 2, 1982,

as aforesaid, were done with prior knowledge that plaintiff was a fifty one year old divorced woman supporting herself and her two children and that she depended upon such employment for economic survival. They further knew that their actions could and did disqualify plaintiff from receiving state unemployment insurance benefits while she was attempting to favorably resolve such discharge grievances. Said actions were willful, fraudulent, malicious, oppressive, and were done with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying an assessment of punitive and exemplary damages in excess of $5,000,000.

SECOND CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANT FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY FOR TORTIOUS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

35. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 26, inclusive, of her FIRST CAUSE OF ACTION.

36. At all times herein mentioned there existed between plaintiff and defendant RALPHS a written contract of employment. Said employment relationship was of a confidential nature and subject to the implied covenant of good faith and fair dealing.

37. Defendant RALPHS, in conspiracy with defendants EMPLOYERS COUNCIL, PRAYZICH, UNION, DAVIS, LAW FIRM, PHILLIPS and DOES 1 through 100, inclusive, and in abuse of their superior bargaining position

breached the implied covenant of good faith and fair dealing in the following respects, among others:

a. In conspiring to deprive, and in depriving plaintiff of her right to continued employment without lawful justification;

b. In conspiring to deprive, and in depriving plaintiff of her right to an arbitration hearing of her December 1, 1981 discharge;

c. In conspiring to deprive, and in depriving plaintiff of her right to receive State unemployment insurance benefits.

38. As a direct and proximate result of the tortious breach of the implied covenant of good faith and fair dealing, and plaintiff's lengthy unemployment, plaintiff suffered grievous and extensive damages as follows:

a. Loss of wages, and benefits, with interest thereon, in excess of $35,000;

b. Severe mental, emotional and

physical distress and illness, and great embarrassment and humiliation, all to her detriment in an amount according to proof;

c. Past, present, and future medical and incidental expenses, according to proof;

d. Defendant RALPHS and the remaining co-conspirators acted fraudulently, maliciously and oppressively towards plaintiff and with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying an assessment of punitive and exemplary damages in excess of $5,000,000.

THIRD CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANT FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

40. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 20, 21 and 22 of her FIRST CAUSE OF ACTION.

41. Following her wrongful discharge on December 1, 1981, and her constructive discharge on April 2, 1982, plaintiff filed claims for unemployment insurance benefits with the Employment Development Department of the State of California.

42. Defendant RALPHS by and through its agents, servants and employees from December 1981 through August 1982, orally and in writing represented to the Employment Development Department that plaintiff was a dishonest employee and was guilty of a number of acts of misconduct.

43. The aforementioned representations to the Employment Development Department were false and were known by defendant RALPHS, its agents, servants and employees to be false when made. Said

representations were made with the intention of depriving plaintiff of her right to receive state unemployment insurance benefits and to cause her to suffer further emotional distress and financial hardship.

44. The true facts were that plaintiff was not a dishonest employee and was not guilty of the acts of misconduct as alleged. In fact, throughout her employment with defendant RALPHS, except for minor indiscretions, plaintiff performed her duties in a proper and workmanlike manner.

45. As a proximate result of the outrageous conduct of defendant RALPHS, its agents, servants and employees, plaintiff suffered severe mental, emotional and physical illness and distress all to her damage according to proof.

46. As a further proximate result of the aforementioned acts, plaintiff was compelled to, and did employ physicians,

psychiatrists, psychologists and other health care providers to examine, treat, and care for her and plaintiff thereby incurred medical and incidental expenses.

47. The aforementioned acts of defendant RALPHS, its agents, servants and employees were willful, malicious, oppressive, and were done with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying as assessment of punitive and exemplary damages in excess of $5,000,000.

48. On October 4 and 26, 1982, after lengthy and time consuming appeal procedures with the State Employment Development Department and with the California Unemployment Insurance Appeals Board, it was determined that plaintiff was

eligible to receive unemployment insurance benefits.

FOURTH CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANTS PAPPY, VOGEL, KAPLON AND PHILLIPS, A PROFESSIONAL LAW CORPORATION; AND RALPH M. PHILLIPS FOR LEGAL MALPRACTICE

49. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 25, inclusive, of her FIRST CAUSE OF ACTION.

50. The relationship existing between plaintiff and defendants LAW FIRM and PHILLIPS was of a fiduciary and confidential nature, requiring undivided loyalty to plaintiff and complete and full disclosure of material facts pertaining to her rights arising from her employment relationship with defendant RALPHS and the controlling collective bargaining agreement.

51. In undertaking to represent plaintiff in such grievances and arbitration hearing, defendants LAW FIRM and PHILLIPS willfully, fraudulently, recklessly and wantonly breached their duty to plaintiff in the following particulars, among others:

a. In ignoring plaintiff's complaints of discrimination, harassment and abuse by defendant RIVERA;

b. In failing to conduct a proper investigation of the facts underlying plaintiff's December 1, 1981 discharge'

c. In failing to subpena witnesses and present evidence atthe March 12, 1982 arbitration hearing which would have established the complete absence of wrongdoing or any just cause for discharge;

d. In accepting defendant RALPHS' version of the facts regarding plaintiff's Decemberl, 1981 discharge and her April 2, 1982 forced resignation without sufficient proof of wrongdoing or just cause;

e. That at plaintiff's March 12, 1982 arbitration hearing, defendant PHILLIPS, with full knowledge of plaintiff;s dire mental, emotional, physical and economic distress, and in collusion with defendants DAVIS, PRAYZICH, RIVERA, and DOES 1 through 25, inclusive, coerced plaintiff into accepting a settlement of her December 1, 1981 discharge that was oppresseive and unconscionable. Such settlement resulted in plaintiff being demoted from the classification of cheese packer to sanitation, and at the same time being switched from day shift to night shift. Such settlement further required plaintiff to waive and withdraw any and all claims against defendant RALPHS, including her claim to state unemployment benefits;

f. In failing to take action to rescind or vacate the settlement agreement entered into March 12, 1982, and to proceed with an arbitration hearing of plaintiff's December 1, 1981 discharge in disregard of

her numerous requests to do so;

g. In intentionally failing to adequately inform plaintiff of her rights under the collective bargaining agreement and of her legal rights and remedies against defendants RALPHS and UNION.

52. The aforementioned actions of defendants LAW FIRM and PHILLIPS were fraudulent, arbitrary, dishonest, in bad faith and were committed with animosity towards plaintiff. Plaintiff alleges that had defendants LAW FIRM and PHILLIPS not acted towards her in a fraudulent, reckless, wanton, and negligent manner, she would have been successful in securing reinstatement with defendant RALPHS at her former position as a cheese packer with full backpay and benefits.

53. The attorney-client relationship existing between plaintiff and defendants LAW FIRM and PHILLIPS terminated on April 5, 1982.

54. As a proximate result of the

wrongful actions of defendants LAW FIRM and PHILLIPS, plaintiff suffereed grievous and extensive damages as follows:

a. Loss of past, present and future wages by reason of her discharge from defendant RALPHS;

b. Severe mental, emotional and physical illness and distress;

c. Past, present and future medical and incidental expenses;

55. The aforesaid actions of defendants LAW FIRM and PHILLIPS were willful, malicious, and oppressive, and were done with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying as assessment of punitive and exemplary damages in excess of $5,000,000.00.

FIFTH CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANT FEDERATED DEPARTMENT STORES, INC. dba RALPHS GROCERY COMPANY FOR MISREPRESENTATION PREVENTING PLAINTIFF FROM OBTAINING EMPLOYMENT (L.C. sec. 1050, 1054)

56. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 5, inclusive, of her FIRST CAUSE OF ACTION.

57. In the months after her forced resignation on April 2, 1982, plaintiff would make applications for employment with various companies. Plaintiff applied for positions in which she was experienced and qualified. However, the personnel officers from said companies each time refused to hire plaintiff.

58. Plaintiff is informed and believes and thereon alleges that defendants RALPHS,

RIVERA, and various managerial personnel thereof provided to such prospective employers, false and misleading information regarding plaintiff's termination, the quality of her work and her loyalty to RALPHS. Plaintiff is informed and believes and thereon alleges that defendant gave such false and misleading information for the purpose of preventing plaintiff from obtaining employment.

59. By reason of such tortious conduct by said defendants, plaintiff has been unable to secure any employment and by reason thereof has suffered loss of wages and benefits in excess of $35,000,000.00. As a further consequence of such lengthy unemployment, plaintiff has suffered severe mental, emotional and physical illness and distress and was compelled to incur medical and incidental expenses, all to her damage according to proof, and that such damages be trebled.

SIXTH CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST ALL DEFENDANTS FOR FRAUD

60. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 26, inclusive, of her FIRST CAUSE OF ACTION.

61. Between plaintiff and defendant RALPHS there existed a written contract of employment. Said employment relationship was of a fiduciary and confidential nature, and was subject to the implied covenant of good faith and fair dealing.

62. At all times herein mentioned the relationship existing between plaintiff and defendants UNION, LAW FIRM, DAVIS and PHILLIPS was of fiduciary and confidential nature, requiring said defendants to act towards plaintiff with complete good faith and honesty for the purpose of protecting plaintiff's rights and interests arising from her employment relationship with

defendant RALPHS and the controlling collective bargaining agreement.

63. Sometime after the filing of her December 1, 1981 discharge grievance, defendants UNION, LAW FIRM, DAVIS and PHILLIPS repeatedly assured and promised plaintiff that she would have a full evidenciary arbitration hearing on her December 1, 1981 discharge.

64. The true facts were that defendants UNION, LAW FIRM, DAVIS and PHILLIPS never intended to have an arbitration hearing of plaintiff's December 1, 1981 discharge. In fact, defendants UNION, LAW FIRM, DAVIS and PHILLIPS conspired and agreed with defendants RALPHS, RIVERA, PRAYZICH and DOES 1 through 25, that defendant RALPHS could have its way with respect to the nature of discipline to be imposed upon plaintiff and that defendants UNION, LAW FIRM, DAVIS and PHILLIPS would not challenge their decision, nor would they insist on an

arbitration hearing.

65. On March 12, 1982, the date on which plaintiff's December 1, 1981 discharge was set for an arbitration hearing, all of the defendants engaged in lengthy negotiations in a conference room outside the presence of plaintiff. These negotiations were spurious, carried on in bad faith and deliberately designed to give plaintiff the false impression that a sincere effort was being made by defendants UNION, LAW FIRM, DAVIS and PHILLIPS to resolve plaintiff's grievance in a fair and just manner.

66. After these spurious negotiations, and pursuant to the conspiracy and agreement with defendants RALPHS, RIVERA, PRAYZICH and DOES 1 through 25, defendants UNION, LAW FIRM, DAVIS and PHILLIPS fraudulently deprived plaintiff of an arbitration hearing and induced plaintiff into accepting a settlement of her December 1, 1981 discharge grievance that was

oppressive and against her best interest.

67. In inducing plaintiff to give up her right to an arbitration hearing and accepting such settlement, defendants UNION, LAW FIRM, DAVIS and PHILLIPS took unfair advantage of plaintiff's weak mental and emotional health and of her dire economic condition. As a further inducement, said defendants falsely represnted to plaintiff that she would be restored to her former position, but was instead demoted in job classification from cheese packer to sanitation and was switched from day shift to night shift.

68. At the time defendants UNION, LAW FIRM, DAVIS and PHILLIPS induced plaintiff to forego her right to an arbitration hearing and to accept such settlement, they knew that such settlement was oppressive and against plaintiff's best interest. Plaintiff on the other hand was relying upon their good faith judgment and was unaware of said defendants' fraudulent,

deceitful and dishonest intentions, and was unaware of their conspiracy and agreement with defendants RALPHS, RIVERA, PRAYZICH and DOES 1 through 25.

69. On March 15, 1982, out of economic necessity and because plaintiff was lead to believe that defendants UNION, LAW FIRM, DAVIS and PHILLIPS could obtain no better result for her, plaintiff returned to work as a sanitation employee at the night shift. However, the working conditions here were more burdensome, the demotion in job classification and switch from a day shift to night shift were punitive in nature and was a scheme devised by all defendants to force plaintiff to quit and which did result in her forced resignation on April 2, 1982.

70. As a direct and proximate result of the fraud, deceit and dishonesty practiced upon plaintiff by defendants UNION, LAW FIRM, DAVIS and PHILLIPS, and in conspiracy with defendants RALPHS, RIVERA,

PRAYZICH and DOES 1 through 25, plaintiff unknowingly presented herself at such arbitration hearing without effective union representation and without effective legal counsel, and was fraudulently induced to give up valuable rights, including her right to a hearing on the merits. Plaintiff alleges that had defendants, and each of them, not engaged in such fraudulent, deceitful and dishonest conduct, she would have had an arbitration hearing which would have resulted in her being reinstated to her former position with full back wages and benefits.

71. As a direct and proximate result of the fraud, deceit and dishonesty perpetrated upon plaintiff by said defendants, and each of them, and by reason of plaintiff's lengthy unemployment, plaintiff suffered grievous and extensive damages, as follows:

a. Loss of wages and benefits, with interest thereon, in excess of $35,000.00;

b. Severe mental, emotional and physical distress and illness and great embarrassment and humiliation, all to her detriment in an amount according to proof;

c. Past, present, and future medical and incidental expenses, according to proof;

d. Plaintiff was compelled to hire attorneys to secure and protect her statutory rights and rights under the collective bargaining agreement and thereby incurred and continues to incur attorneys fees and legal expenses;

72. The defendants, and each of them, acted fraudulently, maliciously and oppressively towards plaintiff and with conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying an assessment of punitive and exemplary damages in excess of $5,000,000.00.

WHEREFORE, plaintiff prays for judgment against defendants jointly and severally as follows:

1. For reinstatement to her former position without loss of seniority;

2. For loss of wages and benefits, with interest thereon;

3. For general damages according to proof'

4. For medical an incidental expenses according to proof;

5. For attorney fees and costs according to proof;

6. For punitive and exemplary damages in an amount in excess of $5,000,000.00;

7. For such other and further relief as the court may deem just and proper.

DATED:_____ _____

Rudolfo Ginez, Jr.

Attorney for Plaintiff

Virginia Aragon

CERTIFICATE OF SERVICE MAIL

I, VANESSA D. WALTON, a member of the Bar of the Supreme Court and attorney of record for Pappy, Kaplon, Vogel and Phillips and Ralph M. Phillips, Petitioner, herein, hereby certify that on 9-4-85 pursuant to Rule 19.5, Rules of the within Supreme Court, I served three copies of the within CROSS-PETITION FOR CERTIORARI on each of the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with first-class postage in the United States mailbox in the City of Los Angeles, California, addressed to said parties as follows:

1. Rudolfo Ginez, Jr.
   926 North Flower Street
   Santa Ana, CA 92703

2. McLauglin and Irvin
   800 West Sixth Street,
   3rd Floor
   Los Angeles, CA 90017

3. Pappy, Kaplon, Vogel & Phillips
   A Professional Law Corporation
   1545 Wilshire Boulevard,
   Suite 211
   Los Angeles, CA 90017

All parties required to be served have been served.

Executed at Los Angeles, California on Sept 4, 1985.

Vanessa D. Walton

VANESSA D. WALTON
Attorney of Record for
Cross-Petitioner, Pappy,
Kaplon, and Phillips
and Ralph M. Phillips

0024b